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July 24, 2019

VIA E-MAIL and U.S. MAIL

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Re: *RFP No. 40-RQ20680730: Read to Achieve Diagnostics – Software As A Service*

Follow-up from Protest Meeting

Dear Ms. Dunn and Mr. Thomas:

On behalf of Amplify Education, Inc. (“Amplify”), I wanted to thank the NC Department of Public Instruction (“DPI”) for allowing us the opportunity to have a protest meeting on the afternoon of July 18, 2019. We appreciated the attention of the many DPI staff who joined us in the Superintendent’s conference room. Since Jonathan Sink led the meeting, but has departed DPI, I am copying Mr. Thomas in his place as counsel for DPI.

As was noted in Amplify’s presentation, a number of the points and concerns raised in our original protest letter were strongly validated when DPI released 166 pages of public records on the afternoon of Friday July 12 (referenced herein as “PDF” with page references).

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I. Amplify's proposal was clearly determined to be superior by DPI, and IStation was deemed not to adequately satisfy critical statutory and RFP requirements.

Amplify's CEO Larry Berger explained in the meeting that the company's position that mCLASS is indeed the best offering for the state of North Carolina was confirmed by the detailed work done by the original Evaluation Committee. You do not need to merely take Amplify's word for it. The Evaluation Committee ranked Amplify #1 among all proposals on the three most important evaluation criteria of the procurement. On one after another of the required specifications that were tagged as "legislatively mandated" by DPI, Amplify received a unanimous 11-vote "yes" of the Committee for meeting the RFP's requirements, when for many of the same specifications IStation received zero "yes" votes. This included the RFP requirement of dyslexia screening¹, identified as one of the two purposes of the procurement by DPI at the outset of the evaluation². Zero committee members believed IStation met the state's requirements for dyslexia screening. This was further confirmed in the Evaluation Ranking materials where it is stated that "IStation is not a reliable screener for dyslexia because it **lacks some key measures** for dyslexia risk factors This will require multiple tools for assessment."³ Indeed, even in the final (and much less detailed) DPI memo of June 7, 2019 intended to justify the award to IStation, DPI admitted that IStation's product is "**missing key measures**" for testing dyslexia. (PDF p. 28 of 166.) This reflects the concern of the original Evaluation Committee that districts would have to use two assessment tools to meet the statutory requirements for dyslexia testing if IStation had been their choice.

DPI's public records further show that DPI agreed (as we stated in our protest letter) that Amplify's offering met the State's requirement that an offering be "developmentally appropriate"⁴ for the K-3 student population. According to the Evaluation Consensus Meeting Notes from November 19, 2018, no Evaluation Committee members believed that IStation met the "developmentally appropriate" requirement, and seven affirmed that IStation did not meet it. As the Committee stated: "Some of the members were concerned about the all online piece of this assessment and how appropriate it is for Kindergartners and struggling learners."⁵

¹ The RFP required a solution that could "adequately and accurately identify indicators of risk for dyslexia in grades K-3 as outlined in NC Session Law 2017-127," RFP, Spec. 8, at p. 26.

² See page 3 of the October 5, 2018 Proposal Evaluation KickOff Meeting, PDF p. 79 of 166.

³ PDF p. 42 of 166.

⁴ RFP, Spec. 9 at p. 26.

⁵ PDF p. 59 of 166. "The team voted 7 No and 4 Maybe for this one as to IStation. Some voting members were concerned about the all online piece of this assessment and how appropriate it is for Kindergartners and struggling learners. The assessment was also for 40 minutes." According to page 26 of the October 5, 2018 Proposal Evaluation Kick Off Meeting, approvals from all voting












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Public records show that in determining whether the vendors demonstrated “Substantial Conformity to Solicitation Specifications,” the Evaluation Committee ranked Amplify higher in the majority of the requirements identified as “legislatively mandated” and deemed most critical by DPI:

Excerpt of table presented by Amplify at protest meeting (full copy attached to this letter as Exhibit A):

Evaluation Consensus

Requisition No. RQ20680730 (Meeting Notes, November 19-20, 2018)

Committee Votes	Amplify	Istation
REQUIREMENTS	YES VOTES	YES VOTES
Dyslexia Screening (BS9)	11 	0 ZERO YES VOTES
Developmentally Appropriate (BS8)	11 	0 ZERO YES VOTES
Information Security Audit SOC2 (TS35)	11 	0 ZERO YES VOTES
Reading Assess To Inform Instruction (BS1)	11 	0 ZERO YES VOTES
Standards Alignment (BS17)	7 	0 ZERO YES VOTES
Progress Monitoring (BS6)	8 	1 
Diagnostic Assessment (BS12)	10 	2 
Project Management /WBS (PMS1)	11 	2 

As we also detailed in the protest meeting, there were also at least two fatal procedural flaws in the procurement process, both of which require the award to IStation to be voided.

members were required on meeting minutes from the consensus meetings, such as the one on November 19. (PDF p. 102 of 166.)

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I. The “cancellation” of the RFP was done after the proposals and costs of each had already been evaluated, yet DIT was told DPI could not evaluate the costs.

First, the “cancellation” of the RFP was clearly improper. In December 2018 and January 2019, DPI’s public records production (which was represented last week as being every record known to the agency at this time on the procurement) reflects that the Evaluation Committee ranked Amplify as the clear number one proposal among the four bidders, and that IStation’s product was found to be deficient and failed to meet key RFP requirements. By January 2019, the Evaluation Committee had reviewed all four proposals in depth and evaluated them on every one of the RFP’s criteria, including cost.

After this full evaluation of all the bids, in a March 2019 meeting of the Evaluation Committee, the minutes of that meeting (PDF p. 13 of 166) state:

One of the voting members breached the confidentiality provisions of the procurement process which jeopardized the legality of this procurement. It should also be noted that the team did not reach a unanimous consensus on the choice of the finalists vendors. Because of these issues the current read to achieve procurement has to be cancelled again.

This is DPI’s basis for the cancellation of the RFP. Yet, DPI’s public records do not document any breach of any confidentiality that occurred on the 2018 RFP, and if any such breach occurred, no records document how that affected the integrity of the procurement.⁶ In the protest meeting, DPI made a reference to a breach of confidentiality but did not disclose any information about it and simply referred Amplify to the public records production, which contains only the information quoted above from the March 2019 meeting. Mr. Sink confirmed in the meeting that he does not possess and is not aware of any public records that document any such confidentiality

⁶ Indeed, as Amplify noted at the protest meeting, DPI spokesperson Graham Wilson apparently stated (mistakenly) just last week that an evaluation committee member had a past business relationship Amplify that was undisclosed, and that this was the alleged basis for the cancellation referenced in the public records. However, Wilson later corrected that statement, as it turned out that was an issue raised in the 2017 RFP that was cancelled, not the 2018 RFP. The allegation apparently concerned someone who was a contractor responsible for scheduling trainings and other logistical details for a few months for Amplify in 2011/2012, and never had anything to do with the substance of Amplify’s offerings. But DPI admits this matter had nothing to do with the 2018 RFP cancellation.

See www.newsobserver.com/news/business/article232712817.html where this information and correction was published in the *News & Observer*.

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breach, other than the mysterious reference in the March 2019 meeting minutes. DPI apparently has no records documenting any alleged confidentiality breach that required a cancellation.

On the “unanimous consensus” point of the March 2019 minutes, Mr. Sink agreed with Amplify in the protest meeting that the normal meaning of the term “consensus” does not mean “unanimous.” It sounds like DPI believes DIT told them that “consensus” requires unanimity, but none of this is documented in any public records. As the original Evaluation Committee noted in its November 19, 2018 meeting minutes, “consensus means general agreement and not unanimity.” (PDF p. 46 of 166.) But even then, the Evaluation Committee’s November 2018 notes show that they did reach a unanimous decision that Amplify’s proposal was the best ranked proposal. (PDF p. 71 of 166.) Nothing in DPI’s records prior to the March 2019 meeting minutes reflect that the Evaluation Committee was unable to make a vendor selection.

As you know, DPI had to get permission from DIT to cancel this information technology procurement. 06 NCAC 06B.04041. The public records produced by DIT and DPI show that DIT understood that DPI sought a cancellation because the cost proposals of Amplify and IStation “are at a disparate price range (so unlike that there is no basis for comparison).” (DIT Approval Form for Cancellation, March 25, 2019, **Exhibit B**). At the protest meeting you also pointed us to a March 21, 2019 memo from DPI to DIT requesting a cancellation which provides no justification for cancellation, and does not disclose the reasons for cancellation documented in the March 2019 Evaluation Committee minutes, attached as **Exhibit C**. The basis for cancellation conveyed to DIT does not match DPI’s basis for cancellation. Indeed, there are no records reflecting that DIT was told that DPI had *already* reviewed all the proposals fully and *had evaluated the costs* of each proposal and ranked them on cost (and every other evaluation criteria.) Thus, any claim that DPI could not evaluate the cost differential of the proposals is wrong, and not a valid basis for cancellation of the RFP process.⁷

Therefore, the cancellation of the RFP in March 2019 was a flawed decision and cannot stand.

II. DPI changed the evaluation criteria and ranking of importance of criteria after reviewing all the proposals. Incredibly, this looks like a blatant attempt to simply give the contract to IStation.

Even assuming the “cancellation” of the RFP was appropriate, even though the “cancellation” never seemed to change anything in the process except throw out the original

⁷ Attached to this letter as Exhibit F is a note about this memo highlighting issues around SOC 2 Type II third party attestation requirements.

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Evaluation Committee's work,⁸ a second fatal procedural flaw is that DPI *changed its RFP evaluation criteria and reordered them to the direct benefit of IStation, after it had already reviewed and evaluated all the proposals*. In short, after DPI rated Amplify as the 4th best proposal on two of the least important RFP criteria (Vendor Cost and Vendor Financial Stability), DPI reordered these two criteria to be the *most* important criteria in its final award evaluation memo. DPI then invented two new criteria not listed in the RFP, and threw out the *most important criteria* of the RFP – whether the vendor met the RFP specifications and state's specific needs for Read to Achieve. Only by “changing the rules of the game” was DPI able to justify an award to IStation.

As reflected in the original Evaluation Committee's records and the RFP, there were six evaluation criteria in this RFP. As the following slide from the December 4, 2018 presentation to Superintendent Johnson shows (PDF p. 39 of 166), the criteria were ranked in the following order:

Evaluation Ranking

Evaluation Criteria	Amplify Education Inc.	Curriculum Associates	IStation	NWEA
Substantial Conformity to specification	1	3	2	4
RtAD Desired Specifications	1	3	2	4
Proof of Concept / Demonstration	1	3	2	3
Vendor Cost Proposal	4	3	1	2
Strength of References	1	1	1	1
Vendor Financial Stability	4	1	1	1
Overall Rank	1	3	2	4

The evaluation criteria are stated in relative order of importance.

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The first three of these criteria (“Substantial conformity to specifications,” “RtA Desired Specifications” and “Proof of Concept/Demonstration”) were deemed most important, as these three factors determine whether vendors can actually meet the RFP's specifications and provide a product that meets North Carolina's needs.

⁸ Even DPI's June 7 award recommendation states it “recommends award under RFP No. 40-RQ20680730A,” which is the allegedly “cancelled” RFP. (PDF p. 29, of 166.)

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The last three criteria in order of importance were “Vendor Cost Proposal,” “Strength of References,” and Vendor Financial Stability.”

In December 2018, Amplify was ranked #1 on the top three criteria of whether it was the best product. It was ranked #4 on Vendor Cost Proposal and Vendor Financial Stability,⁹ but, again, these were among the least important criteria.

However, in the DPI’s June 7 final award recommendation, suddenly Vendor Cost Proposal and Vendor Financial Stability were ranked as the #1 and #2 *most important* criteria on a new list of only four total criteria. DPI did this already knowing that it believed Amplify would be ranked #4 on these criteria.

This re-ordering of the importance of the award criteria can only be seen by any rational observer to be a blatant attempt on someone’s behalf to give this award to IStation. But that’s not all DPI did. In addition, after making “Cost” and “Vendor Financial Stability” its top two criteria (instead of #4 and #6), DPI *threw out its top three criteria completely*. Instead, DPI created two new criteria: “formative and diagnostic assessment” and “personalized learning.” (PDF p. 20 of 166.) It is not clear what “formative and diagnostic assessment” means, since the whole purpose of the RFP is to procure “valid, reliable, formative and diagnostic reading assessments.” (RFP p. 6.) Furthermore, “personalized learning” is not among the required specifications of the RFP. Instead, one of the 14 non-mandatory “desirable but not required” specifications at the end of the RFP’s ten pages of specifications makes a reference to “a personalized blended approach to assessment and learning.” Certainly Amplify was not informed by the RFP or at any point that this would be one of only four award criteria.

The following graphic shows DPI’s wholesale change of the criteria from the RFP and original Evaluation Committee to the final award to IStation last month (copy also attached to this letter as **Exhibit D**):

⁹ Amplify has contracts for work in all 50 states. Amplify does not believe it has any issue with financial stability. For purposes of the bid protest meeting, Amplify accepted DPI’s relative ranking of the proposals. Even if Amplify was appropriately ranked fourth on this criterion, it submits that any differential among the vendors was not substantively significant on this point, which is consistent with this criterion being ranked *last* in order of importance.

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Evaluation Criteria: Read to Achieve Diagnostics, Requisition No. RQ20680730

Fall 2018 Evaluation

Amplify IStation

Spring 2019 Evaluation

PRIORITY	EVALUATION CRITERIA	RANK	RANK
1	Substantial Conformity To Specification	1	2
2	RtAD Desired Specifications	1	2
3	Proof Of Concept / Demonstration	1	2
4	Vendor Cost Proposal	4	1
5	Strength Of References	1	1
6	Vendor Financial Stability	4	2
	Overall Rank	1	2

PRIORITY	EVALUATION CRITERIA
1	Vendor Cost Proposal
2	Vendor Financial Stability
3	Formative & Diagnostic Assessment
4	Personalized Learning

"Personalized Learning" Criterion Listed As "Desirable But Not Required"

Source: Fall 2018 Evaluation: Read to Achieve -- 2018, December 4, 2018 presentation; Spring 2019 Evaluation: Contract Award Recommendation, June 7, 2019.

Note: Evaluation criteria were listed in order of importance in both evaluations.

It seems obvious to any rational observer why DPI had to throw out the top three evaluation criteria of the RFP and the original Evaluation Committee: Amplify scored in first place on all three. There was no way DPI could justify an award to IStation under the RFP's requirements.

As I discussed in the protest meeting, DPI has even admitted in public records that it had changed the evaluation criteria. In a May 23 draft of its award recommendation memo, DPI stated that it had based its decision "on the evaluation factors determined appropriate."

This is in contrast to what DPI stated at the time of the RFP cancellation, when DPI communicated to DIT that it intended to conduct negotiations to obtain best value "based on the evaluation factors set form [sic] in the solicitation" and informed DIT that it will be "proceeding in this manner." (March 21, 2019 memo from DPI to DIT, **Exhibit C**). Instead, DPI proceeded to disregard the top three evaluation factors of the RFP, elevate the importance of two lower evaluation factors it already deemed Amplify to rank low on, and add two wholly new criteria.

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Excerpts of memo (full copy attached to this letter as Exhibit E):

Contract Award Recommendation

To: Andrea Pacyna
Deputy Chief IT Procurement Officer
Department of Information Technology

From: Tymica Dunn
Procurement Chief
Department of Public Instruction

Date: May 23, 2019

Subject: Contract Award Recommendation
Read to Achieve Diagnostics - Requisition # - RQ20680730, DIT File #300042

Section 5: Evaluation of Bid Submission

In response to DIT No. 40-IT00115-18 – DPI RFP No. 40-RQ20680730 four (4) bid proposals were received. The RFP cancellation was issued on March 21, 2019 since NCDPI deemed soliciting formal offers via IPS again would serve no valuable purpose. Pursuant to the definition of “Negotiation” in 9 NCAC6B.0102, DPI conducted negotiations with two (2) of the four (4) vendors to maximize the State’s ability to obtain best value based on the evaluation factors determined appropriate.

Only choosing to use “evaluation factors determined appropriate” after the RFP has been issued, and bids have been opened and evaluated, clearly violates North Carolina law. An agency cannot change the rules of an RFP after the bids have been opened and evaluated. This would be an invitation to bias and corruption. An agency must follow the rules of its RFP, and even after a valid cancellation cannot materially alter the scope of the original RFP. *See Humble Oil & Refining Co v. Bd. of Alderman*, 284 N.C. 458, 467, 202 S.E.2d 129, 135 (1974) (agencies must follow their own rules); 09 NCAC 06B.0316 (“Negotiations shall not materially alter the intent or scope of the original solicitation document.”) North Carolina requires competition for contracts for goods and services, and if the award criteria of a procurement could be changed and re-ordered after proposals have been opened and evaluated, an agency could simply “game the system” to give an award to whoever they wish.

In the final June 7 award memo, the above reference to evaluating the proposals on “the evaluation factors determined appropriate” was deleted. (PDF p. 21 of 166.) Yet, DPI did not attempt to correct the problem. It did not reinstate the original RFP criteria and Evaluation Committee determinations. Instead, the award recommendation memo contains the re-ordered and new criteria detailed above.

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It should also be noted that the change of evaluation criteria also violates the 2017 and 2018 budget bills. Section 7.27(b)-(c) of the 2017 budget bill (S.L. 2017-57, p. 86-87) required this procurement to consider “minimum” certain factors, which were recognized by the original Evaluation Committee (PDF p. 37 of 166), and reflected in the detailed specifications of the original RFP. The RFP also contained many additional mandatory required specifications. The June 7 award memo does not show compliance with the RFP and budget bills as demonstrated by the original Evaluation Committee. The Superintendent did not have discretion in selecting an awardee, but had to accept the Evaluation Committee selection. S.L. 2017-57, Sec. 7.27(c). Even so, there is evidence in the public records that the Superintendent may have tried to influence the Evaluation Committee selection, telling them in a January 2019 meeting what he felt was important in making a selection. (PDF p. 33 of 166)

The changing and re-ordering of the award criteria after the proposals had been opened and evaluated (in a way that seemed plainly designed, by someone, to reject Amplify and select IStation) clearly violates North Carolina procurement law. Mistakes can occur in procurements despite the best intentions of an agency, and the solution to this is to correct the mistake. Here, the award to IStation should be rescinded, and an award made to Amplify.

A resolution to this matter is important, as another school year will soon be starting for North Carolina students. Some year round schools are already in session. In order for schools, teachers and administrators to have a successful back to school transition, with the knowledge as to which tool will be used for the Read to Achieve program, we encourage a timely resolution to this matter so that the State can limit impact to the schools and students across the state.

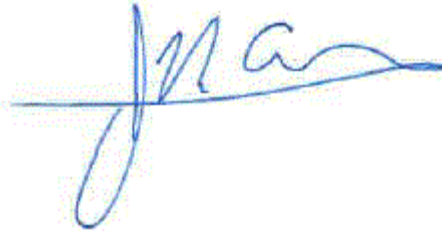
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Conclusion

Thank you again for your attention to this matter. Please let me know if you need anything further regarding the above mentioned materials. Pursuant to 09 NCAC 06B.1102(c)(2) and N.C. Gen. Stat. § 1A-1, Rule 6(a) and N.C. Gen. Stat. § 1-593, we look forward to receiving a response to the protest meeting by Monday July 29.

Very truly yours,

SMITH, ANDERSON, BLOUNT, DORSETT,
MITCHELL & JERNIGAN, L.L.P.

A handwritten signature in blue ink, appearing to read 'JMA', with a long horizontal flourish extending to the right.

By: J. Mitchell Armbruster

JMA/

Enclosure (exhibits)

cc: (via email)
Eric Snider, General Counsel for SBE
Tiffany Lucas, Special Assistant Attorney General
Jessica Middlebrooks, Counsel for DIT